



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/48804/2014

THE IMMIGRATION ACTS

Heard at Birmingham ET

**Decision & Reasons
Promulgated**

On 4 March 2016

On 18 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE KAMARA

Between

MR NAVEED ASHRAF KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Hussain, solicitor, Syeds Solicitors

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

- 1.** This is an appeal against the decision of First-tier Tribunal Judge Shergill promulgated on 5 March 2015, in which he dismissed the appellant's appeal.

2. Permission to appeal was granted by First-tier Tribunal Judge Nicholson on 12 May 2015.

Anonymity

3. No direction has been made previously, and there is no reason for one now

Background

4. The appellant arrived in the United Kingdom on 22 November 2009, in possession of entry clearance as a spouse, valid until 28 January 2012. On 28 January 2012, he made an in time application for leave to remain as the spouse of a settled person. That application was rejected on 9 February 2012 as no fee was paid. The same application was re-submitted, out of time, on 7 September 2012 and was refused on 21 March 2013, with no right of appeal. A judicial review brought on 16 July 2013 was refused on 22 May 2014. On 9 July 2014, the appellant applied for indefinite leave to remain outside the Immigration Rules.
5. The Secretary of State refused the application on 25 November 2014 on the basis that the appellant failed to satisfy the requirements of paragraph A280B as well as Appendix FM, particularly under the partner route. It was noted that the appellant could not meet paragraph 287(vi) as he had submitted only an ESOL Entry Level 1 certificate. Furthermore, while it was accepted that the appellant had a genuine and subsisting relationship with his wife, the reasons he provided for his spouse not wishing to leave the United Kingdom were not considered to amount to insurmountable obstacles. Consideration was also given to the appellant's private life under paragraph 276ADE of the Rules as well as the absence of exceptional circumstances, with the Secretary of State concluding that the appellant did not qualify for a grant of leave.
6. The appellant appealed to the First-tier Tribunal. The grounds of appeal asserted that the respondent had not considered a grant of leave outside the Rules. It was said that the appellant had become an overstayer owing to an error on the part of his previous representatives and that he otherwise met all the requirements for leave to remain as a spouse. It was also argued that the respondent's decision was not in accordance with the law.

The hearing before the First-tier Tribunal

7. The appellant alone gave evidence before the FTTJ, it being said that his wife had taken her mother to hospital at the time of the hearing. No application was made for an adjournment.
8. The FTTJ was not satisfied that the appellant met the requirements of paragraph 287(i) of the Rules in relation to English language and knowledge of life in the United Kingdom. Nor did the FTTJ accept that the wife's refusal to go to Pakistan amounted to insurmountable obstacles.

9. In considering the appellant's Article 8 claim outside the Rules, the FTTJ found that any interference in his family life was not disproportionate on the evidence before him.

The grounds of appeal

10. The grounds of appeal submitted that the FTTJ had overlooked the public interest requirement in section 117B of the 2002 Act; that the contents therein favoured the appellant and that the FTTJ had undertaken a freewheeling Article 8 assessment.
11. Permission to appeal was granted on the basis that it was unclear whether the FTTJ was aware of the statutory obligation imposed by section 117B and permission was granted on this ground. Permission was not refused on any remaining grounds.
12. The Secretary of State's response of 22 May 2015 indicated that the appeal was opposed. It was argued that the FTTJ had taken into account the principle points in section 117B, which were not determinative of the appeal in any event. The facts of the case were described as mundane; the appellant could not meet the Rules and advanced little evidence to demonstrate any compelling circumstances outside them. An error of law was said to be immaterial.

The error of law hearing

13. Mr Khan relied on the decisions of AM (S117B) Malawi [2015] UKUT0260 (IAC) and Forman (ss117A-C considerations) [2015] UKUT 00412 (IAC). He argued that section 117B of the 2002 Act had not been considered in any manner and had not been mentioned at all. The error was material because had the FTTJ considered it, there could have been a different outcome. The appellant had entered the United Kingdom lawfully and had become an overstayer owing to one factor alone; he did not pay the correct fee on a previous application. Were it not for this issue, the appellant would have had indefinite leave to remain given that the old maintenance requirements applied and the Secretary of State was satisfied as to the relationship between the appellant and his wife.
14. Mr Khan appreciated that there was a lack of evidence relating to several matters before the FTTJ, however he argued that on the basis of the evidence that was before the Tribunal, the appeal ought to have been allowed. The appellant had paid thousands of pounds in fees over the years and the FTTJ ought to have found that he would have intended to pay the fee in 2012. The Rules were not there to catch out those who make a minor mistake and the FTTJ should have assessed whether the appellant could have met the requirements for further leave to remain in 2012. Mr Khan indicated that were an error of law found, he would wish to proceed by way of submissions only and there was a realistic chance of success.

- 15.** Mr Mills agreed that it would be an error of law for the FTTJ to ignore section 117B in form and substance. The respondent's case was that the relevant points set out in the said section were considered. The grounds were those frequently raised in the Secretary of State's appeals and it was hard to see how the errors said to have been made were material to the outcome.
- 16.** Mr Mills addressed each of the factors set out in section 117B and argued that they outcome of any consideration of those factors would not result in a reduction of the public interest concerns or for more weight to be attached to the appellant's circumstances.
- 17.** Mr Mills submitted that a near-miss argument was being advanced on the appellant's behalf, but that the appellant was not entitled to any credit for almost meeting the Rules in 2012. Before the FTTJ, the appellant had been portrayed as an innocent victim of poor advisors, whereas Mr Khan was saying otherwise today. Regardless, the FTTJ had addressed this matter in the decision, referring to the fact that there was no evidence of the culpability of the previous representatives and that there were no documents before the FTTJ which related to his unsuccessful judicial review of an earlier decision to refuse leave with no right of appeal.
- 18.** In reply, Mr Khan denied that he was making a near-miss argument for Article 8. The issue of the wrong fee was one to be considered in the proportionality exercise. It was only a technical failure and even if the appellant was to blame, this was a matter the FTTJ was required to assess. Otherwise, Mr Khan re-argued the appeal, stating that it was not reasonable for the appellant's wife to relocate owing to her family and work but that the FTTJ had concluded that it was not unduly harsh.

Decision on error of law

- 19.** At the end of the hearing, I announced that I found no material error of law in the FTTJ's decision. My reasons are as follows.
- 20.** In AM (Malawi), headnote (1) states, "*The statutory duty to consider the matters set out in s117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant.*"
- 21.** Also relevant from AM is headnote (2), where it says "*an Appellant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3) whatever the degree of his fluency in English, or the strength of his financial resources.*"
- 22.** Mr Khan is correct in stating that the FTTJ made no direct reference to s117B. However, I find that the FTTJ had regard to the public interest in immigration control at [36], the ability, or rather inability, of the appellant to speak English at [16], and that he was financially independent owing to his wife's employment at a McDonald's restaurant at [33]. Furthermore at

[14], the FTTJ took into consideration the fact that the appellant had lawful leave until 28 January 2012.

23. The FTTJ also had regard to matters not directly mentioned in section 117B of the Act, including the lack of documentary evidence regarding the appellant's complaint about his previous representative; the lack of medical evidence regarding his mother-in-law alleged ill-health and the lack of evidence to support the contents of his wife's witness statement as to her unwillingness to travel to Pakistan.
24. I consider the issues, to which I have referred in the preceding paragraph, to be far more relevant to the outcome of the appeal than those set out in section 117B, however no challenge is made to the FTTJ's conclusion at [30] that the appellant's wife could reasonably be expected to accompany the appellant to Pakistan.
25. It is apparent from Forman and AM that the matters raised in the first five sub-paragraphs of section 117B show when the public interest is increased as opposed to decreased.
26. An ability to speak English is therefore a neutral factor and not a positive factor in the appellant's favour. In any event, the appellant was found by the FTTJ not to meet the English language requirement in the Rules and I was referred to no evidence to support the claim made in Mr Khan's submissions that the appellant spoke English to any standard. Accordingly, had the FTTJ considered this matter with direct reference to section 117B(2), he would have considered it to be a further reason to increase the weight to be accorded to the respondent's case.
27. Financial independence is also a neutral factor and I do not accept that had the FTTJ made reference to section 117B(3) that he would have reached a different overall conclusion. Accordingly, any error would be immaterial.
28. While it would have been preferable if the FTTJ had more clearly demonstrated that he had regard to the matters set out in section 117B of the 2002 Act, the decision shows that he considered the relevant matters, including those not specifically referred to in the Act. There is, therefore, no material error of law in his decision.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

Signed
Deputy Upper Tribunal Judge Kamara

Date: 5 March 2016